Supreme Court of the United States

No. 76 Misc. October Term, 1947.

MARK ALBANESE, by his mother and next friend, BARBARA MARY KELNHOFER,
Petitioner,

vs.

HUBERT RICHTER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinions of the Courts Below.

The opinion of the District Court is reported in 67 F. Supp. 771. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 161 F. (2d) 688.

Jurisdiction.

Jurisdiction of this Court to grant a writ of certiorari has been invoked under Title 28 U. S. Code § 347; Act of February 13, 1925, c. 229, § 1, 43 Stat. 938.

Statement of the Case.

The proceedings in this cause were instituted by the petitioner, Mark Albanese, an illegitimate child, represented by his mother and next friend, Barbara Mary Kelnhofer, to

establish the domestic relationship of parent and child as between him and the respondent, and to compel respondent to contribute to the support of the petitioner during his minority. While the complaint in form alleges three separate causes of action, the fundamental and primary issue as to paternity is presented in each, and each is directed to establishing the domestic relationship and obtaining a decree for support.

The Second and Third Causes of Action seek a support order, based on the statutes of the states of New York and New Jersey, wherein an obligation is imposed upon parents to support illegitimate children. The First Cause of Action is ancillary to the other two and here the petitioner demands that a certain agreement made between his mother and the respondent be declared null and void. In this agreement as set forth in the complaint as "Exhibit A" the mother covenanted and acknowledged that the respondent was not the father of her expected child, and in consideration of a payment of $7,500.00, made a general release of any and all claims which *she** might have against the respondent by reason particularly of her "pregnancy, the birth of the expected child, or for its support, education and maintenance". The agreement is made expressly upon behalf of Barbara Mary Kelnhofer and does not purport to be for or on behalf of the petitioner. Petitioner nevertheless claims that the agreement is an attempt by the alleged father to circumvent his obligation to support the child (Complaint, par. 14).

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* It will be noted that under the New York statute liability is imposed upon the father to pay the expenses of the mother's confinement and recovery and other expenses incidental to her pregnancy. New York Domestic Relations Law Sec. 120.

The respondent moved to dismiss the complaint and each cause of action therein on the ground that (1) the court lacked jurisdiction of the subject matter, and (2) the court lacked jurisdiction because the amount in controversy is less than $3,000.00, exclusive of interest and costs. The District Court and the Circuit Court of Appeals for the Third Circuit did not find it necessary to pass upon the question as to the amount in controversy, but each based its decision primarily upon the ground that the court lacked jurisdiction of the subject matter. Upon its own motion the District Court raised the question as to whether the infant was the proper party plaintiff to enforce the statutory obligation and to attack the agreement. The District Court found that the statutes, which are in derogation of the common law, did not confer upon the infant any right to bring an action in his own name in a case such as this, and also concluded that the infant had no authority to bring the action to set aside the agreement. The judgment of dismissal is accordingly based on these additional grounds.

ARGUMENT.

POINT I.

The District Court lacked jurisdiction over the subject matter which involves the domestic relations between parent and child.

A.

The Federal District Court does not have prerogative power, *parens patriae*, over children, and lacks jurisdiction in general, over the subject of domestic relations.

The primary object of this action of the petitioner, an illegitimate child, is to establish the relationship of parent and child as between him and respondent and to invoke the aid of the court to supervise and enforce the obligation to support arising out of such domestic relationship under the statutes. The petitioner does not seek a judgment to satisfy a liquidated indebtedness, but rather "demands of the defendant such sum or sums as this Court may deem proper and necessary for the support and education of plaintiff Mark Albanese." The alleged father having refused to support the petitioner, the District Court was thus requested by the child to determine his personal needs for sustenance, housing, clothes, etc., now and during the remaining 19 years of his minority and, in addition, to determine his needs for education and thereupon to compel the respondent to contribute sums to defray such expenses.

The District Court was thus requested, in effect, to recognize the petitioner as a ward of the court, and to exercise the sovereign power of *parens patriae* under which, his-

torically, the king, as "father of his country" and today in this country the several sovereign states, protect the persons and property of infants, lunatics and other incompetents. This power the Federal District Courts do not have.

The power of the state to control the infantile status in the interest of the child and in the interest of the state and to decide questions as to its custody, property, guardianship, education, and support rests upon the doctrine of *parens patriae*. The broad extent of this power, even as against the wishes of the parents, is well defined by Justice Minturn in *Lippincott* v. *Lippincott*, 97 N. J. Eq. 517 (E. & A. 1925) where, after reviewing the early Greek, Persian, and Roman Law, he concluded (97 N. J. Eq. 520):

> "The English common law, in the light of these extreme policies, presented a composite system, which, within reasonable limitations, conceded to the parent absolute control, subject to the power of the king, as *parens patriae*, to control the infantile status in the interest of the child, as well as in the interest of the state. 1 Bl. Com, supra.
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> This power in England was at times taken over by the state absolutely, as in ancient Greece, by various parliamentary enactments, during the continuance of the various religious hallucinations of the seventeenth and eighteenth centuries, when the children of one denomination were forcibly taken from their parents for the purpose of inculcating a denominational religious education, which was presumed to be in harmony with the policy of the reigning dynasty as opposed to the policy of a supposed foreign domination. These obnoxious enactments continued upon the British statute books until the political enlightenment attendant upon the American revolution, concerning popular rights, succeeded in the reign of

> George IV (chapter 7) in repealing them. I Sharsw. Bl. 452. These enactments stand, however, as a legal epoch evincing the power of the state, when deemed necessary to its political policy and safety, to intervene as *parens patriae*, by assuming the Spartan role of absolute possession, of the infant in the interest of the state.
>
> The cases in this country, illustrative of the exercise of this general power in behalf of the infant, are supplied in the main by the early chancery jurisdiction of New York, when the learning of Chancellors Kent, Walworth and Livingston lent additional emphasis to the adjudications. Thus, says Chancellor Kent: 'This court has the care and protection of infants during their minority.' 1 Johns. Ch. 25."

The prerogative powers of the sovereign states as *parens patriae* have not been delegated to the Federal Government by the several states, and federal courts have consequently uniformly held that they cannot exercise such powers. The rule is well stated in *1 Hughes, Federal Practice Jurisdiction and Procedure* (1931) sec. 321, p. 245:

> "The Federal District Courts have no authority to exercise the functions of parens patriae, as such prerogative powers remain exclusively with the several states."

This Court considered the general problem in an early case involving a charity where one of the questions presented was whether a federal court could exercise prerogative powers of the crown in connection with charities, as distinguished from ordinary chancery powers. *Fontain* v. *Ravenel*, 17 How. 369 (1885). Mr. Justice McLean there held (17 How. 384):

"The courts of the United States cannot exercise any equity powers, except those conferred by Acts of Congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the United States. Powers not judicial, exercised by the Chancellor merely as the representative of the sovereign, and by virtue of the King's prerogative as *parens patriae* are not possessed by the Circuit Courts."

Mr. Justice Taney concurring in a separate opinion, said (17 How. 393):

"It remains to inquire whether the Constitution has conferred this prerogative power on the courts of equity of the United States.

The 2d section of the 3d article of the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the King, as *parens patriae,* in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the Constitution, extends only to cases over which the court of chancery had jurisdiction in its judicial character as a court of equity. The wide discretionary power which the Chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred.

These prerogative powers which belong to the sovereign as parens patriae, remain with the States. . . . Nobody will for a moment suppose that a court

> *of equity of the United States could, in virtue of a state law, take upon itself the guardianship over all the minors, idiots, or lunatics in the State**."

It is upon this same reasoning that the courts have uniformly held that they lack jurisdiction on a petition by a father for a writ of habeas corpus to obtain custody of his child from the mother or other relative. *In re Barry,* 42 Fed. 113 (C. C. S. D. N. Y. 1844), *writ of error dismissed for want of appellate jurisdiction, sub. nom., Barry* v. *Mercein,* 5 How. 103 (1847); *In re Burrus,* 136 U. S. 586 (1890). In the *Burrus* case, which is considered the leading case on the subject, Mr. Justice Miller held (136 U. S. 593):

> "In the case before us there was no pretense that the child was restrained of its liberty, or that the grandfather withheld it from the possession and control of the father, under or by virtue of any authority of the United States, or that his possession of the child was in violation of the Constitution or any law or treaty of the United States. *The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.*"

Similar holdings were made in *Clifford* v. *Williams,* 131 Fed. 100 (C. C. Wash. 1904); *Ex parte Bell,* 240 Fed. 758 (N. D. Calif. 1917).

Upon the same principle it has been held that the federal courts will not decide questions involving the custody of the insane. *Hoadly* v. *Chase,* 126 Fed. 818 (C. C. Ind. 1904) aff'd in memo 129 Fed. 818 (C. C. A. 7th, 1903),; *In re Ryan,* 47 F. Supp. 1023 (E. D. Pa. 1942); *U. S. ex rel*

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* All emphasis mine unless otherwise indicated.

Grove v. *Jackson,* 16 F. Supp. 126 (M. D. Pa. 1936); *Hammon* v. *Hill,* 228 Fed. 999 (W. D. Pa. 1915); *Shapley* v. *Cohoon,* 258 Fed. 752 (D. Mass., 1918).

The basic doctrine is followed in other decisions recognizing that federal courts have no jurisdiction to appoint guardians for infants or incompetents, that matter being wholly within the jurisdiction of the states. See *City of Detroit, Mich.* v. *Blanchfield,* 13 F. (2d) 13, 16 (C. C. A. 6th 1926); *Southern Ohio Sav. Bank & Trust Co.* v. *Guaranty Trust Co. of New York et al.,* 27 F. Supp. 485 (S. D. N. Y. 1939).

The federal courts in a long line of cases have held uniformly that they lack jurisdiction over the subject of divorce, or the allowance of alimony, either as an original proceeding in Chancery, or as incident to a divorce *a vinculo* or to one *a mensa et thoro. Barber* v. *Barber,* 21 How. 582 (1859); *Simms* v. *Simms,* 175 U. S. 162 (1899); *De La Rama* v. *De La Rama,* 201 U. S. 303 (1906); *State of Ohio ex rel. Popovici* v. *Agler,* 280 U. S. 379 (1930); *Williams* v. *North Carolina,* 325 U. S. 226 (1945), *rehearing denied,* 325 U. S. 895 (1945); *McCarty* v. *Hollis,* 120 F. (2d) 540 (C. C. A. 10th, 1941); *Bowman* v. *Bowman,* 30 Fed. 849 (C. C. N. D. Ill. 1887); *Hastings* v. *Douglass,* 249 Fed. 378 (N. D. W. Va. 1918); *Calhoun* v. *Lange,* 40 F. Supp. 264 (D. Md. 1941); *Applegate* v. *Applegate,* 39 F. Supp. 887 (E. D. Va. 1941).

In the *Popovici* case the Court held that a writ of prohibition could not be issued properly by the federal courts against a state court to prevent it from entertaining a divorce suit against a foreign vice consul, since only the state court had proper jurisdiction over the subject matter. Mr. Justice Holmes held (280 U. S. 383):

> "It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States,' [citations omitted] and the jurisdiction of the courts of the United States over divorces and alimony always has been denied."

Only recently the Court recognized the basic lack of jurisdiction in a case involving the question of the faith and credit to be given a state divorce decree. *Williams* v. *North Carolina,* 325 U. S. 226, 232 (1945). Mr. Justice Frankfurter there held:

> "The problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudications with due regard for another most important aspect of our federalism whereby 'the domestic relations of husband and wife . . . were matters reserved to the States,' *Popovici* v. *Agler,* 280 U. S. 379, 383-84, and do not belong to the United States. *In re Burrus,* 136 U. S. 586, 593-94."

He further held (325 U. S. 237):

> "If a State cannot foreclose, on review here, all the other States by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a Federal system in which regulation of domestic relations has been left with the States and not given to the national authority."

Further recognition of the lack of federal jurisdiction over domestic relations is found in the many attempts to

secure an amendment of the Constitution to authorize Congress to establish uniform laws with respect to marriage and divorce. Resolutions to achieve this result were introduced in Congress as early as 1920, and only recently another proposal was made in the House of Representatives, 91 Cong. Rec. May 3, 1945, at 4238.

In *McCarty* v. *Hollis,* 120 F. (2d) 540 (C. C. A. 10th 1941) the plaintiff sought a declaratory judgment that he and the defendant were not husband and wife, or in the alternative, an annulment. The court concluded that it lacked jurisdiction, holding (120 F. (2d) 542):

> "A United States court is without jurisdiction to grant divorces or annul marriages. It has been consistently said without deviation that the field of domestic relations affecting husband and wife, or parent and child, belongs exclusively to the laws of the states.
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> . . . the suit concerned itself primarily with the domestic relation existing between the parties. . . . The primary question for adjudication was whether the parties were husband and wife, and if so whether the marriage should be annulled. *The subsidiary question whether the defendant was entitled to maintenance or a division of property depended upon a determination of the primary question. The action was clearly within the field of domestic relations.*"

It is submitted that the foregoing authorities clearly establish the lack of jurisdiction in the present case. The complaint here, and each cause of action therein, turn on the narrow but fundamental question of the domestic rela-

tionship between the petitioner and the respondent, and of the obligation to support arising out of such relationship. The petitioner is seeking a judicial determination of his status as the alleged illegitimate son of the defendant, and seeks a support order based on such determination. In effect he is seeking to be treated as a "ward" of the court, for if a support order were made it would be a continuing one which would have to be supervised and administered by the District Court for many years to come, with appropriate modifications from time to time as the infant matured and progressed through the various stages of childhood with the concomitant changes in the need for support and education. The prayer for relief is in complete disregard of the principle enunciated long ago by Mr. Chief Justice Taney in *Fontain* v. *Ravenel*, 17 How. 369, 393 (1885), *supra*, where he said:

> "Nobody will for a moment suppose that a court of equity of the United States could, in virtue of a state law, take upon itself the guardianship over all the minors, idiots, or lunatics in the State."

The subject matter of the present dispute is one of "domestic relations . . . of parent and child" within the meaning of the many cases and authorities, and involves a matter within the exclusive jurisdiction of the state as *parens patriae*.

B.

The relationship between an illegitimate child and its parents is covered by the law of domestic relations within the doctrine of *parens patriae*.

Petitioner presents the novel argument that since the child in the present case is illegitimate, domestic relations between parent and child are not here involved. In so doing, he fails to recognize that while it is true that at common law a father has no legal obligation to support his illegitimate child, that very doctrine itself is a principle of the law of domestic relations covering the relationship between parent and child. Sir William Blackstone entitled one of the chapters of his *Commentaries* as follows: "Of Parent and Child". His introduction to this chapter reads:

> "The next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.
>
> Children are of two sorts; legitimate, and spurious, or bastards, each of which we shall consider in their order; * * *" (1 Blackstone, *Commentaries* *446).

Petitioner is unable to describe the parties in the present case other than as "parent" and "child", which is the definition of a factual relationship. It is upon the existence of that relationship that the entire claim to support here must rest. Yet it is argued strangely that none of these are involved in the present case. Significantly, when the State of New York by statute undertook to change the legal incidents flowing from this factual relationship, the act is found in that section of its law entitled the New York Domestic Relations Act (sec. 120). This is one of the statutes that petitioner relies upon.

The New Jersey statute upon which the petitioner also relies, reflects a similar philosophy in that it provides that illegitimate children are entitled to support "to the same extent as if born in lawful wedlock" (R. S. 9:16-2). The New Jersey legislature has here seen fit to revise the common law rules governing the domestic relations between parent and child, and has in effect said that a parent is under a duty to support all of his children whether they be legitimate or otherwise.

The common law rules governing the domestic relations between husband and wife, and parent and child have been changed literally in hundreds of instances by modern legislation. Typical are statutes imposing on children the obligation to support their parents, grand parents and other related persons. Others grant wives powers to enter into contracts, to bring actions in their own names, and to acquire property independently and through their husbands. Divorce legislation changing the terms and conditions upon which divorces *a vinculo*, or *a mensa et thoro*, may be granted appears in a great variety of forms. Despite the countless changes in such laws, it has never been contended that such rights and obligations are not a part of our law of domestic relations.

The application of the doctrine of *parens patriae* with reference to illegitimate children has been recognized by the courts. *Fischer* v. *Meader*, 95 N. J. L. 59 (Sup. Ct. 1920); *In Re R. L.*, 137 N. J. Eq. 271, (Ch. 1945); *Jones* v. *Jones*, 161 Misc. 660, 663 (Dom. Rel. Ct. N. Y. C. 1937).

It is therefore submitted that under the authorities the relationship between an illegitimate child and its father is one involving domestic relations within the doctrine of *parens patriae*.

C.

The District Court lacked jurisdiction to declare the instrument set forth in the First Cause of Action null and void.

As has already been pointed out the First Cause of Action in seeking a declaration as to the nullity of the agreement is entirely ancillary to the other two causes of action seeking to establish paternity and the obligation to support. It is obvious that petitioner's primary purpose is not merely to establish the falsity of an agreement between his mother and the respondent in which it is acknowledged that an expected child is not the respondent's. Of necessity, this cause of action, while separately entitled, has as its primary objective the desire to establish legally the domestic relationship of parent and child in order to obtain a decree for support. Plaintiff is not seeking independent substantial relief within the court's jurisdiction which merely involves a question of domestic relations collaterally. It is accordingly clear that since the primary object to be obtained is the establishment of the domestic relationship, which is the entire basis of the cause of action, the Federal District Courts lack jurisdiction.

The authority relied upon by petitioner to establish jurisdiction is *Sharon* v. *Terry,* 36 Fed. 337 (C. C. N. D. Calif. 1888) *aff'd* 131 U. S. 40 (1889), but this case is clearly distinguishable from the case at bar.

It will be recalled that this *cause celebre,* which was before the courts of California and the federal courts for many years and was the subject of many reported opinions

on various phases of the litigation*, involved an action by the fabulously wealthy Senator Sharon seeking to have an alleged marriage contract cancelled as a forgery. In 1885 Judges Sawyer and Deady rendered a decree of cancellation (26 Fed. 337). Senator Sharon died before the decision was announced, and thereafter Miss Hill married Mr. Terry. Despite the decree, she continued to prosecute an action in the courts of California to establish the marriage, her community property rights and claims for alimony. She refused to deliver up the forged instrument for cancellation. Thereupon, the executor of Senator Sharon's estate filed a bill of revivor in the federal courts and it is the opinion which was handed down on this phase of the case upon which plaintiff relies here (36 Fed. 337).*

The *Sharon* case is clearly distinguishable from the case at bar. It will be noted that the action there was instituted not to *establish* a domestic relationship, but to negative its existence and to secure the cancellation of a forged instrument. Any relief granted, other than cancellation of the instrument and an injunction as to its use, would of necessity have to be based upon an adjudication that a domestic relationship did *not* exist between the parties.

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* *Ex Parte Terry*, 128 U. S. 289 (1888); *Terry* v. *Sharon*, 131 U. S. 40 (1889); *Hill* v. *Sharon*, 131 U. S. 430 (1888); *Cunningham* v. *Neagle*, 135 U. S. 1 (1890); *Sharon* v. *Hill*, 20 Fed. 1 (C. C. Calif. 1884); *Sharon* v. *Hill*, 22 Fed. 28 (C. C. Calif. 1884); *Sharon* v. *Hill*, 23 Fed. 353 (C. C. Calif. 1885); *Sharon* v. *Hill*, 24 Fed. 726 (C. C. Calif. 1885); *Sharon* v. *Hill*, 26 Fed. 337 (C. C. Calif. 1885); *Sharon* v. *Hill*, 26 Fed. 722 (C. C. Calif. 1885); *Sharon* v. *Terry*, 36 Fed. 337 (C. C. Calif. 1888); *In re Terry*, 36 Fed. 419 (C. C. Calif. 1888); *In re Terry*, 37 Fed. 649 (C. C. Calif. 1889); *In re Terry*, 39 Fed. 833 (C. C. Calif. 1889).

* After the matter was argued one of the members of the Court was assaulted by Mrs. Terry in public. Later when Mr. Justice Field was delivering his opinion Mrs. Terry accused him in open court of having been "bought". After serving a prison sentence for contempt, Mr. Terry attempted to kill Mr. Justice Field but was himself shot and killed by a special marshal, one Neagle. Cunningham *v.* Neagle, 135 U. S. 1 (1890).

That the parties in this hotly contested litigation were themselves aware of this distinction clearly appears from the opinions. Originally, Mrs. Terry had instituted her divorce action in the state court, but upon the application of Senator Sharon the proceedings were removed to the federal court. Thereafter, when a motion to remand was made on the ground of lack of federal jurisdiction, the parties by stipulation consented to the remand (36 Fed. 362). In this very opinion relied upon by petitioner, Mr. Justice Field noted the distinction between the two cases, saying (36 Fed. 341):

> ". . . the one proceeding upon an assumed valid contract, and asking for a divorce and a division of the community property, and the other seeking a cancellation of the contract for alleged forgery. . . ."

If the court had granted the relief sought, other than cancellation and an injunction against the use of the forged instrument, it would have been on a finding that a marriage relationship did not exist. In the present case, on the other hand, plaintiff is seeking to establish a domestic relationship, and any relief would be based on a determination that a relationship of parent and child existed here.

Of even greater importance, however, is the fact that the decree in the *Sharon* case is limited to an adjudication that the instrument was a forgery, and an injunction was granted against its use by Mrs. Terry as evidence or otherwise to support her claim of marriage. The court did not adjudicate that she was not married and did not enjoin her from pressing that claim. Whether or not the instrument was a forgery was a factual question that did not require the court to decide any question of domestic relations.

Equally important, furthermore, is the fact that the jurisdiction point was not presented in the original case, nor on an appeal from the judgment therein. The attempt to raise the question was only made at a later time upon a bill of revivor and came as a collateral attack upon the judgment obtained previously.

Aside from any considerations arising out of the heat of the controversy and the attacks made upon the honor and persons of the federal judges, it is obvious that the Supreme Court would be reluctant to reverse where the jurisdictional argument was only presented collaterally. The opinion of Mr. Justice Miller is conclusive upon this point. He held (131 U. S. 48):

> "It would be a very anomalous proceeding for this court now, on the mere review of the order reviving the suit and appointing a new party to conduct it on the part of the plaintiff, to go back and decide upon the whole question which was passed upon by the circuit court in the original decree. That decree was open to appeal when it was rendered. If the defendant, Hill, was dissatisfied with it, or believed it was erroneous, or made without jurisdiction, she had the right to appeal to this court. It was not only open to her, but it was the proper remedy if she desired to test it further. The order substituting the executor as plaintiff in that suit grants no new rights, does not enlarge that decree, and does not change its status, its construction, or its validity. All the rights which she would have had against William Sharon, the plaintiff in that suit, she has against Frederick W. Sharon, who is substituted for him in the case. It would be productive of innumerable evils and delays if, on this proceeding to supply the defect in the original suit arising out of the death of the plaintiff,

> everything that had been done in that suit, although there was a final decree in the case, should be reconsidered and become the subject of renewed litigation.
>
> * * * *We have not made this reference to the proceedings in the court below with a view of reconsidering the soundness of those decisions.* It is sufficient to say that as presented to us, it is at least a prima facie case of jurisdiction as between the parties, and that the question of the soundness and correctness of the decision of that court on the merits cannot be inquired into in the present proceeding."

In view of the foregoing distinctions it is submitted that the *Sharon* case cannot be relied upon to establish jurisdiction over the First Cause of Action in the present case, but in any event, if the case is not distinguishable, it must be considered overruled by the many later cases discussed above (*supra*, pp. 6-12). It obviously has no application to the Second and Third Causes of Action.

POINT II.

The First Cause of Action was properly dismissed for failure to join all necessary parties.

Even if it were assumed that the court had jurisdiction to declare the agreement null and void, the judgment of dismissal should be affirmed for failure to join Mary Barbara Kelnhofer as a necessary and indispensable party.

It is well settled that if an indispensable party is not before the court the action must be dismissed. *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80 (1920); *Texas* v. *Interstate Commerce Commission*, 258

U. S. 158, 163 (1922); *Camp* v. *Gress*, 250 U. S. 308 (1919). This principle has been applied in many cases under the new federal rules. *Neher* v. *Harwood*, 128 F. (2d) 846 (C. C. A. 9th, 1942); *United States* v. *Washington Institute of Technology*, 47 F. Supp. 384, (D. Del. 1942); *Gargilis* v. *Gleavy*, 45 F. Supp. 721 (D. Mass. 1942); *American Signal Corp.* v *International Roll-Call Systems, Inc.*, 110 F. (2d) 942 (C. C. A. 4th, 1940); *Barr* v. *Rhodes*, 35 F. Supp. 223 (W. D. Ky. 1940).

Under the first cause of action the plaintiff, Mark Albanese, "demands that the instrument termed 'Declaration and Agreement, Receipt and Release' annexed hereto and marked Exhibit A be declared null and void". Whether this be considered a plea for a declaratory judgment or a prayer for a decree of cancellation, it would seem clear that Barbara Mary Kelnhofer, in her individual capacity, is an indispensable party to the action since it will be noted the agreement is entirely between her and the respondent. If the court were to enter a decree holding the contract null and void it would certainly affect the contractual rights as between the respondent and Miss Kelnhofer, who is not before the court, or if on the other hand, the court held that the contract was valid it could still not make a final termination of the matter. In the absence of Miss Kelnhofer the decree would not be *res judicata* as to her and she could thereafter bring an independent action to attack the contract on the ground of duress and fraud, or if the contract is held void, it would be necessary for the respondent to bring a new and independent action against Miss Kelnhofer to recover the sums of money paid thereunder.

The rule is well stated and the authorities collected in 2 *Moore's Federal Practice* (1938) page 2148 as follows:

> "Generally all of the parties to an instrument or agreement are indispensable parties to a suit based thereon. Thus in a suit to obtain specific performance, reformation, rescission, cancellation, or an injunction against cancellation of a contract, to alter the terms of a trust instrument, to set aside a lease or a conveyance, to set aside a grant of land made by the state, to set aside an award of money by a municipality, or to enjoin the performance of a contract between the United States and a city, all of the parties thereto are indispensable."

In view of the foregoing the First Cause of Action was properly dismissed for failure to join a necessary and indispensable party.

POINT III.

The Second and Third Causes of Action were properly dismissed, since the statutory causes of action therein alleged are not vested in the party plaintiff.

The Second and Third Causes of Action, which are based on the New York and New Jersey statutes respectively, and which are brought by the infant "Mark Albanese, by his mother and next friend, Barbara Mary Kelnhofer" fail to state proper causes of action, since the statutory cause of action is here not vested in the infant.

The common law rule in both New Jersey and New York is, of course, that the putative father is under no legal liability to support an illegitimate child. *Layton* v. *Cooper*, 2 N. J. Law 61 (Sup. Ct. 1806); *In re Vieweger*, 93 N. J. Eq. 527 (Ch. 1922); *People ex rel. Lawton* v. *Snell*, 216 N. Y.

527 (1916); *Todd* v. *Weber,* 95 N. Y. 181 (1884); *Bissell* v. *Myton,* 160 App. Div. 268 (1914), *aff'd.,* 214 N. Y. 672 (1915); *Thomson* v. *Elliott,* 152 Misc. 188 (1934); *Anonymous* v. *Anonymous,* 174 Misc. 906 (1940); *Schneider* v. *Dennat,* 267 App. Div. 589 (1944), *app. den.* 267 App. Div. 954.

Since both the New Jersey and New York statutes are in derogation of the common law, under the usual rule they must be strictly construed. In *People ex rel. Lawton* v. *Snell,* 216 N. Y. 527 at 532 (1916), in considering a bastardy statute the court held:

> "The proceedings by which the liability shall be determined and fixed are defined and controlled exclusively by the statutes *which must be in their substance strictly and fully complied with.*"

The second cause of action is based on Section 120 of the New York Domestic Relations Law. Section 122 of the statute makes specific provision governing the method by which duty may be enforced, and provides as follows:

> "A proceeding to compel support and education in accordance with this article may be brought by the mother, or her personal representative, or, if the child is or is likely to become a public charge on a county, city or town, by a public welfare official of the county, city or town where the mother resides or the child is found. Complaints may be made in the county where the mother or child resides or is found or in the county where the putative father resides or is found. The fact that the child was born outside of the state of New York shall not be a bar to entering a complaint against the putative father in any county where he resides or is found, or in the county where

the mother resides or the child is found. *After the death of the mother or in case of her disability, it may also be brought by the child acting through a guardian or next friend.*"

Under the express language of the statute it is clear that the proceeding is to be brought by the mother in her own name. The language of the Legislature in this respect is obviously studied and deliberate, since in the last sentence of the above quoted section special provision is made for cases in which the proceeding may be brought "by the child acting through a guardian or next friend."

The third cause of action is based on Title 9 of the Revised Statutes of New Jersey, Section 16-2 (L. 1929, c. 153 sec. 1) and again specific provision is made governing enforcement procedures (R. S. 9:16-3):

> "Proceedings to enforce the obligations imposed by Section 9:16-2 of this title may be maintained by one parent against the other, or by the person having physical custody of the child, or, if the child is or is likely to become a public charge, the proceedings may be instituted by the overseer of the poor of the municipality or municipalities where the father and mother, or either of them, reside. In such proceedings consideration shall be given to the age of the child and the ability and financial condition of the parent or parents."

Here again it will be noted that the statute makes no provision permitting an infant to maintain the action in his own right by his mother or next friend.

Since the complaint is based not upon a common law duty, but upon a statutory obligation, the statute imposing

the statutory obligation and providing for the method of its enforcement is controlling. Both of the statutes make clear provision as to how the obligation shall be enforced, and neither afford any remedy to the infant directly in a case such as this.

Rule 17(c) of the Federal Rules providing that an infant may sue by his next friend, does not create new causes of action in an infant, but merely recognizes a procedure to be followed where an infant has a valid obligation which he is entitled to enforce directly. Under the Act of Congress empowering the Supreme Court of the United States to prescribe rules of civil procedure for the Federal courts it is specifically provided:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant" (Act of June 19, 1934, c. 651, sec. 1; 48 Stat. 1064; 28 U. S. C. Sec. 723b).

In view of this express language it is clear that a substantive cause of action vested in the mother by a state statute, cannot be transferred and vested in any other person by virtue of any federal rule of procedure.

In view of the foregoing, since it is clear that the statutory causes of action are not here vested in the petitioner, the District Court's action in dismissing the Second and Third Causes of Action was entirely proper.

POINT IV.

The District Court lacked jurisdiction because the amount in controversy does not exceed $3,000, exclusive of interest and costs.

The complaint contains the usual general allegation that the amount in controversy, exclusive of interest and costs, exceeds $3,000., but a detailed examination of the allegations of the complaint reveals conclusively that actually the requisite jurisdictional amount is lacking.

The statute defining the jurisdiction of the district courts (28 U. S. C. A. sec. 41(1)), relating as it does to original jurisdiction, as distinguished from appellate jurisdiction, must be strictly construed in order that the power reserved to the several states shall not be infringed upon. *Healy* v. *Ratta,* 292 U. S. 263 (1934).

In determining the amount in controversy the court will not consider the collateral effect that its judgment may have in the future or otherwise. Thus, in general, where an action is brought for installment payments due under an insurance contract which do not total more than $3,000 at the time of the institution of the action, jurisdiction is held lacking, even though the effect of a judgment would settle the liability for future payments which would exceed the jurisdictional amount. *Wright* v. *Mutual Life Ins. Co. of New York,* 19 F. (2d) 117 (C. C. A. 5th, 1927), *aff'd per curiam,* 276 U. S. 602 (1928); *Mutual Life Ins. Co. of New York v. Moyle,* 116 F. (2d) 434 (C. C. A. 4th, 1940); *Equitable Life Assur. Soc. of the United States* v. *Wilson,* 81 F. (2d) 657 (C. C. A. 9th, 1936); *Button* v. *Mutual Life*

Ins. Co., 48 F. Supp. 168 (W. D. Ky., 1943); *Gates* v. *Union Central Life Ins. Co.*, 56 F. Supp. 149 (E. D. N. Y., 1944); *Godfrey* v. *Brown Paper Mill Co., Inc.*, 52 F. Supp. 926 (W. D. La., 1943).

It is fundamental that the matter in dispute must be of such a nature as to be capable of being reduced to a pecuniary standard of value. *Kurtz* v. *Moffitt*, 115 U. S. 487 (1885); *Perrine* v. *Slack*, 164 U. S. 452 (1896); and see 1 Moore's Federal Practice (1938) page 520, and 54 Am. Juris. page 745 where the many cases are collected.

In denying jurisdiction, the courts have judicially determined that a great variety of claims are of such a nature that it is impossible to reduce them to a pecuniary standard of value. Typical examples of such claims are as follows: disputes as to custody or guardianship of children (*Barry* v. *Mercein*, 5 How. 103 (1847); *DeKrafft* v. *Barney*, 2 Black 704 (1863); *In re Burrus*, 136 U. S. 586 (1890); *Perrine* v. *Slack*, 164 U. S. 452 (1896); *Hoadley* v. *Chase*, 126 Fed. 818 (C. C. Ind. 1904), *affirmed in memo*, 129 Fed. 1005 (C. C. A. 7th, 1903); *Clifford* v. *Williams*, 131 Fed. 100 (C. C. Wash. 1904)); claims for divorce (see *Simms* v. *Simms*, 175 U. S. 162 (1899); *De La Rama* v. *De La Rama*, 201 U. S. 303 (1906); claims for divorce and alimony *Bowman* v. *Bowman*, 30 Fed. 849 (C. C. N. D. Ill. 1887); *Chappell* v. *Chappell*, 86 Md. 532 (1898); and an inquisition of lunacy (*U. S. ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (C. C. A. 2d. 1924).

Of the many cases referred to above, those presenting the closest analogy to the case at bar involve problems of domestic relations, *i.e.* questions of divorce, alimony, and the custody or guardianship of children. In holding that these disputes are beyond the jurisdiction of the federal

courts, it has been emphasized that a determination as to the domestic status cannot be given a pecuniary standard of value, and that collateral or auxiliary results of such determination which involve financial settlements are not controlling. The average divorce action, for example, involves much more than a judicial determination that the relationship of husband and wife shall be terminated. Real and substantial financial claims are frequently involved as to the future support of children of the marriage, the future support of the divorced wife, the payment of counsel fees and expenses of litigation, property settlements and the like.

Applying the foregoing principles to the case at bar, it is immediately apparent that the present dispute is likewise one not capable of being reduced to a pecuniary standard of value. The complaint and each cause of action therein turns on a determination of the domestic status with an attempt to enforce a duty to support arising out of such relationship. Just as a spouse seeks a declaration of the termination of the marriage relationship, and an award of alimony to continue the obligation to support, so here the petitioner seeks a declaration that he is the respondent's illegitimate child, and also asks a support order. In each case the nature of the relationship involved makes it impossible to properly assign a pecuniary standard of value.

The right of an illegitimate child to support and education is no more certain in amount or duration than a claim for alimony, and in many ways is even more uncertain. For example, under both the New Jersey and the New York statutes it will be noted that the obligation to support the child is placed upon *each* of the parents (N. J. R. S. 9:16-2,

3; N. Y. Domestic Relations Law secs. 120, 132), and it would appear that the obligation of one is reduced to the extent a proper share can be borne by the other. Furthermore, in some cases if the child has property of its own, this may be used for his support and education. *In re Vieweger,* 93 N. J. Eq. 527 (Ch. 1922). The death of the child or the parent might terminate the right to support at an early time, or as the child grows older it may start to earn its own expenses. Considering the problem pragmatically, could or would any reasonable business man, not a speculator, attempt to evaluate the pecuniary worth of such uncertain obligations as they exist today? Significantly, the petitioner himself did not ask the court to do this impossible task. The *ad damnum* seeks an order for support which if granted would be subject to the further order of the court and could be varied from time to time to meet the situation as it develops. The court could not today give a final judgment for the sum of money which, it could be reasonable contended, would constitute the value of the matter in dispute.

The First Cause of Action seeking that an agreement between Barbara Mary Kelnhofer and the respondent be declared null and void does not alter this result. As has been pointed out above, this cause of action is ancillary to the other two. Its value, as far as this petitioner is concerned, can be no greater and no more capable of being reduced to a pecuniary standard than the relief sought in the Second and Third Causes of Action. Since it does not seek a decree for damages it is even less capable of being reduced to a pecuniary measure.

Petitioner relies upon *Thompson* v. *Thompson,* 226 U. S. 551 (1913) and *Brotherhood of Locomotive F. & E.* v. *Pink-*

ston, 293 U. S. 96 (1934) to establish that in determining the jurisdictional amount the court could calculate the value of a controversy by considering the monthly sums due, and projecting possible future payments upon the basis of actuarial tables.

These cases are distinguishable on the ground that in each instance the monthly sums sued for had already been definitely fixed when the problem of jurisdiction arose, in the first case by the decree of the District Court of Columbia, and in the second case by the terms of the pension plans sued upon. In the *Thompson* case the Court was considering, not the original jurisdiction of the District Court of Columbia, but its own *appellate* jurisdiction. Statutes regulating appeals are considered remedial and the Court has always construed them liberally, as distinguished from the strict construction applied to the statutes defining the original jurisdiction of the district courts. If the Court in that case had held that it could not entertain the appeal, the appellant would have had no other remedy. In the case at bar petitioner is free to pursue his remedies in the state courts.

In the present action, the monthly payment has not been fixed either by the terms of a contract, or by a determination made by some other court, and accordingly in considering the original jurisdiction of the District Court the amount in controversy can not be given any pecuniary standard of value by the use of actuarial tables or otherwise.

It is accordingly clear that the subject matter of each cause of action and the relief sought are of such a nature that it is impossible to reduce them to a definite pecuniary

standard today, and accordingly each action was properly dismissed for failure to meet the jurisdictional standards prescribed by Congress for the Federal District Courts.

Conclusion.

For the reasons set forth herein it is respectfully submitted that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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On the brief.